

INTRODUCED: 11/09/2009

REFERRED TO: Economic Development Committee

SPONSOR: Councillor Smith

DIGEST: approves the guaranty of the yield on low income tax credits in order to enable the sale of such low income tax credits by the Indianapolis Housing Agency for rehabilitation projects in the City to be developed by its non-profit arm Partners for Affordable Housing, Inc.

SOURCE:

Initiated by: Indianapolis Housing Agency  
Drafted by: Barnes & Thornburg LLP

LEGAL REQUIREMENTS FOR ADOPTION:  
Subject to approval or veto by Mayor

PROPOSED EFFECTIVE DATE:  
Adoption and approvals

GENERAL COUNSEL APPROVAL: \_\_\_\_\_ Date: November 5, 2009

*GENERAL COUNSEL COMMENTS: The general counsel has not yet reviewed the underlying documents to which the proposed guaranty would apply. The Council's chief financial officer has indicated that he is not yet comfortable with some of the risks of the proposed guaranty.*

CITY-COUNTY GENERAL RESOLUTION NO. \_\_\_\_\_, 2009

A GENERAL RESOLUTION approving guaranty of the yield on low income tax credits in order to enable the sale of such low income tax credits by the Indianapolis Housing Agency for the Apartments (as hereinafter defined), which are rehabilitation projects in the City of Indianapolis (the "IHA Project"), defined below.

WHEREAS, pursuant to Indiana Code 36-7-18, the Indianapolis-Marion County Council has previously created the Indianapolis Housing Agency ("IHA") as a special agency with the public purpose of accomplishing the efficient, cost-effective construction and/or rehabilitation of necessary low and moderate income housing in the City of Indianapolis (the "City"); and

WHEREAS, IHA has created and is the sole member of the Partners for Affordable Housing, Inc. ("PAH"), as a nonprofit arm, incorporated under Indiana Code 23-17, *et. seq.*, to perform the actual construction and/or rehabilitation of the housing projects; and

WHEREAS, IHA previously applied for, and received low income tax credits from the federal government to offset some of the costs of the rehabilitation of the Laurelwood Apartments, the Rowney Terrace Apartments, the Twin Hills Apartments, and the Blackburn Terrace Apartments, all located in Indianapolis (collectively, the "Apartments"); and

WHEREAS, PAH will act as the development arm of IHA in the rehabilitation of the Apartments (such construction and rehabilitation, the "IHA Project"); and

WHEREAS, IHA has entered into negotiations with a private investor (the "Investor" or "Investors") to purchase the tax credits at a discount in order to provide equity capital for the rehabilitation of the Apartments, and the Investor has required that PAH provide a guaranty of the yield that the Investor will receive on the tax credits (the "PAH Guaranty"); and

WHEREAS, pursuant to Indiana Code 23-17-4-2, nonprofit corporations operating under the laws of Indiana may offer guaranties of their obligations or liabilities; and

WHEREAS, as the nonprofit arm of IHA, PAH and has minimal assets of its own, and IHA desires to secure the PAH guaranty with a guaranty from the City to PAH on the payment of the PAH guaranty, in a form substantially similar to that attached hereto as Exhibit A (the "City Guaranty"); and

WHEREAS, pursuant to Indiana Code 36-7-18-35(b) a housing authority such as IHA may accept aid from a political subdivision such as the City; and

WHEREAS, pursuant to Indiana Code 36-7-19-2 and 36-7-19-3, a political subdivision such as the City may spend public money for, give aid to and provide financial assistance of any kind to a housing authority established under Indiana Code 36-7-18 that operates within the jurisdiction of the political subdivision; and

WHEREAS, IHA has requested the approval of the City-County Council of the issuance of the City Guaranty to PAH and the approval of the City-County Council of the financing structure for the IHA Project, and the City-County Council now finds that the financing structure and City Guaranty should be approved; and

WHEREAS, the City will receive remuneration for the issuance of the City Guaranty (the "Remuneration"); and

WHEREAS, the City desires to pledge the Remuneration to the use of the City Guaranty until such time as the City Guaranty is no longer in force and effect or until such earlier time as the Remuneration is no longer needed to secure the City's Guaranty; now therefore:

BE IT RESOLVED BY THE CITY-COUNTY COUNCIL OF THE  
CITY OF INDIANAPOLIS AND OF MARION COUNTY, INDIANA

SECTION 1. For the purpose of accomplishing the efficient, cost-effective construction or rehabilitation of necessary low and moderate income housing in the City of Indianapolis and for the purpose of providing adequate financing for such construction or rehabilitation of the Apartments, the City-County Council does hereby approve the financing of the IHA Project by the sale of low income tax credits to the Investor, backed by a guaranty on the yield on the tax credits offered by PAH to the Investor.

SECTION 2. In order to effectuate the sale of the tax credits and to provide security for the PAH Guaranty, the City-County Council does hereby approve the granting of the City Guaranty to PAH on the PAH Guaranty to the Investors, in a form substantially similar to that attached hereto as Exhibit A. PAH will be the sole beneficiary of the City Guaranty.

SECTION 3. The Remuneration shall be used for no purpose except as security for the City Guaranty and the Remuneration is hereby pledged by the City to the payment of the City Guaranty until such time as the City Guaranty is no longer in force and effect or until such earlier time as the Remuneration is no longer needed to secure the City's Guaranty, such pledge being effective as set forth in Ind. Code §5-1-14-4 without the necessity of filing or recording this resolution or any other instrument except in the records of the City.

SECTION 4. This resolution shall be in full force and effect upon its passage by the City-County Council and compliance with Ind. Code §36-3-4-14.

The foregoing was passed by the City-County Council this \_\_\_\_\_ day of \_\_\_\_\_, 2009, at \_\_\_\_\_ p.m.

ATTEST:

\_\_\_\_\_  
Bob Cockrum  
President, City-County Council

\_\_\_\_\_  
Melissa Thompson  
Clerk, City-County Council

Presented by me to the Mayor this \_\_\_\_\_ day of \_\_\_\_\_, 2009, at 10:00 a.m.

\_\_\_\_\_  
Melissa Thompson  
Clerk, City-County Council

Approved and signed by me this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

\_\_\_\_\_  
Gregory A. Ballard, Mayor

EXHIBIT A

**GUARANTY**

THIS GUARANTY (the "Guaranty") is made as of \_\_\_\_\_, 2009 by the City of Indianapolis, Indiana (the "Guarantor").

WITNESSETH:

WHEREAS, Partners for Affordable Housing, Inc., an Indiana nonprofit corporation (the "Managing Member") organized the \_\_\_\_\_ Fund, LLC, an Indiana limited liability company (the "Upper Tier Company");

WHEREAS, concurrently herewith, the Managing Member and \_\_\_\_\_, (the "Investor Member") have executed the Limited Liability Company Agreement of the Upper Tier Company (as amended, supplemented or otherwise modified from time to time, the "Upper Tier Operating Agreement") pursuant to which the Investor Member has purchased a 99.99% investor member interest in, and been admitted as a non-managing member of, the Upper Tier Company;

WHEREAS, one of the purposes of the Upper Tier Company is to provide capital for the development of affordable rental housing that generates federal tax credits pursuant to Section 42 of the Internal Revenue Code of 1986, as amended, and such purpose is more specifically set forth in Section 1.3 of the Upper Tier Operating Agreement; terms not otherwise defined in this Agreement shall have the meaning given to such terms as set forth in the Upper Tier Operating Agreement;

WHEREAS, City Real Estate Advisors, Inc., an Indiana corporation ("CREA") organized the CREA Guaranteed Tax Credit Fund I, LLC, an Indiana limited liability company (the "Middle Tier Company");

WHEREAS, concurrently herewith the Upper Tier Company has been admitted to the Middle Tier Company as a 99.99% non-managing member pursuant to the Limited Liability Company Agreement of the Middle Tier Company (as amended, supplemented or otherwise modified from time to time, the "Middle Tier Operating Agreement") the Middle Tier Operating Agreement and the Upper Tier Operating Agreement are sometimes referred to herein collectively as the "Operating Agreements";

WHEREAS, the purchase by the Investor Member of its 99.99% interest in the Upper Tier Company was dependent in part on the execution and delivery by the Guarantor of this Guaranty;

NOW, THEREFORE, in consideration of the mutual covenants and promises in this Guaranty, to induce the Investor Member to acquire an interest in the Upper Tier Company as indicated above and to enter into the Upper Tier Operating Agreement, and for other good and valuable consideration, including the fees payable to the Guarantor which relate to the obligations of the Guarantor in this Guaranty, the receipt and sufficiency of which are hereby acknowledged, the parties to this Guaranty declare and agree as follows:

SECTION 1. The Guarantor hereby primarily, unconditionally, irrevocably and absolutely guarantees the full and prompt payment and performance when due by the Managing Member of its Guaranteed Obligations as defined in the Upper Tier Operating Agreement.

If the Guarantor receives written notice from the Investor Member or any representative of the Upper Tier Company that the Managing Member is in default in its Guaranteed Obligations, the Guarantor shall have five Business Days from receipt of such written notice to make such Mandatory Loans and/or to make such other payments to the Upper Tier Company, and provisions of the Upper Tier Operating Agreement otherwise applicable to or for the benefit of the Managing Member shall be applicable to and extend to the benefit of the Guarantor. The Upper Tier Company agrees to apply any moneys received from the Guarantor under this Guaranty in the manner applicable to such moneys by the Upper Tier Operating Agreement. The Upper Tier Company agrees to distribute any moneys received from the Guarantor pursuant to this Guaranty to the Investor Member. The obligations of the Guarantor under this Guaranty

shall survive (a) the dissolution or liquidation of the Upper Tier Company or (b) the transfer of the Investor Member's Interest in accordance with the terms of the Upper Tier Operating Agreement.

SECTION 2. This Guaranty is a guaranty of payment and performance and not of collection. The Guarantor hereby agrees that its obligations hereunder shall be unconditional (and shall not be subject to any advance, set-off, counterclaim or recoupment whatsoever), whether or not from time to time reduced, or extinguished, whether or not recovery may be or hereafter become barred by any statute of limitations or otherwise, and whether or not enforceable against the Managing Member or any other entity and despite any arrangement or composition entered into in connection with any bankruptcy or other proceeding, any other circumstances that might otherwise constitute a legal or equitable discharge of a surety or guarantor or any other circumstances that might otherwise limit the recourse of the Investor Member against the Guarantor. The Guarantor also hereby unconditionally, irrevocably and absolutely guarantees the full and prompt reimbursement of any and all reasonable costs, fees (including reasonable attorney's fees) and out-of-pocket expenditures actually incurred in connection with enforcing the obligations of the Guarantor under this Guaranty if the Guarantor defaults in performance of its obligations under this Guaranty. The Guarantor waives diligence, presentment and demand for payment, protest, any notice of any assignment hereunder in whole or in part or of any default hereunder or under the Operating Agreements, and all notices with respect to this Guaranty or the Operating Agreements. No waiver by the Investor Member of any of its rights under the Operating Agreements or this Guaranty and no action by the Investor Member to enforce any of its rights under this Guaranty or failure to take, or delay in taking, any such action shall effect the obligations of the Guarantor hereunder.

The obligations of the Guarantor hereunder shall remain in full force and effect without regard to, and shall not be affected or impaired by, (i) any amendment or modification of or addition or supplement to the Operating Agreements, except as such amendment, modification, addition or supplement shall directly affect any obligation hereunder (and the Investor Member shall have affirmatively consented thereto), (ii) any extension, indulgence or other action or inaction in respect of the Operating Agreements, or any exercise or non-exercise of any right, remedy, power or privilege in respect of such document or this Guaranty, (iii) any default by the Guarantor or the Managing Member under, or any illegality or unenforceability of, or any irregularity or defect in, the Operating Agreements or any provision of this Guaranty, (iv) any event of bankruptcy, insolvency, reorganization or similar proceeding involving or affecting the CREA, the Upper Tier Company, the Middle Tier Company or the Managing Member, (v) the terms and provisions of any reimbursement agreement relating to this Guaranty, or (vi) any other circumstances, whether or not the Guarantor or the Investor Member shall have actual or constructive notice or knowledge thereof. The Guarantor hereby waives to the fullest extent permitted by law any and all notices and defenses to which it may be entitled by law to its obligations hereunder, including, without limitation, notice of acceptance of this Guaranty, and any requirement of diligence on the part of the Investor Member or any other parties to the Operating Agreements. Notwithstanding the foregoing, or anything else contained in this Guaranty, the Guarantor shall have no greater obligations hereunder than the monetary obligations of the Managing Member under the Upper Tier Operating Agreement.

All notices, demands or other communications hereunder shall be in writing and shall be deemed to have been given when the same are (a) delivered to a nationally recognized overnight courier service, service prepaid, which requires written acknowledgement of receipt, (b) when delivered personally and signed by an authorized signatory, in each case, to the parties at the addresses set forth below or at such other addresses as such parties may designate by notice to other parties, or (c) by telefax, with confirmation immediately followed by certified or registered mail, postage prepaid, in each case at the addresses (or at the telefax number) applicable to the respective parties as set forth below:

(a) if to the Guarantor, at the following address:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_

with a copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_

(b) if to the Investor Member, at the following address:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_

with copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(c) if to the Upper Tier Company or to the Managing Member, at the following address:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_

(d) if to the Middle Tier Company or to CREA, at the following address:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_

SECTION 3. Notwithstanding any other provisions of this Guaranty, the obligations of the Guarantor under this Guaranty are subject to the Investor Member not being a Defaulting Investor Member under the Upper Tier Operating Agreement.

SECTION 4. Representations and warranties of the Guarantor.

4.1 The Guarantor is an [incorporated municipality under Indiana law] and has the requisite corporate power and authority to enter into this Guaranty.

4.2 The Guarantor has all requisite power and capacity to execute and deliver this Guaranty, and has the necessary authorization, consents and approvals and has the necessary power and authority to execute, deliver and perform its obligations under this Guaranty and no additional consents or approvals are required in connection therewith.

4.3 This Guaranty has been duly and validly executed and delivered by the Guarantor and constitutes the legal, valid and binding obligation of the Guarantor and is enforceable against the Guarantor in accordance with its terms, except as the enforceability thereof may be limited by bankruptcy, insolvency, reorganization or moratorium of other similar laws relating to the enforcement of creditors rights generally and general principles of equity.

4.4 There is no litigation presently existing involving the Guarantor that could adversely affect the enforceability of the obligations of the Guarantor under this Guaranty.

SECTION 5. Any amendment to or waiver of any provision of this Guaranty shall be in writing and signed by the parties.

SECTION 6. This Guaranty may be executed in one or more counterparts, each of which shall be deemed an original and all of which taken together shall constitute a single agreement.

SECTION 7. This Guaranty shall be a continuing obligation of the Guarantor. To the extent any amendment, waiver or assignment of any provision of this Guaranty affects the obligation of the Guarantor contained in *Section 1*, the written consent of the Investor Member is also required. This Guaranty shall be governed by the laws of the State of Indiana.

IN WITNESS WHEREOF, the Guarantor has caused this Guaranty to be executed by its authorized representatives as of the date and year first above written.

THE GUARANTOR

By: \_\_\_\_\_  
Title: \_\_\_\_\_

Name: \_\_\_\_\_